SUPREME COURT, U.S.
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No. 97 1591

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1997

NICHOLAS DAMER,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED:

1. Whether California Business and Professions Code §6103 -- which allows punishment of an attorney for failure to obey a court order that "ought in good faith" to be obeyed -- provides so little guidance to practitioners as to what conduct is prohibited as to be constitutionally defective pursuant to Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)?

2. Whether the imposition of attorney discipline is constitutional when no determination has been made as to whether the attorney's activity was constitutionally protected?

3. Whether the imposition of attorney discipline is constitutional where the attorney's activity was constitutionally protected?

LIST OF PARTIES

The only known parties to the current proceeding are those noted on the cover, namely the Petitioner himself, the California Supreme Court, and that Court's subordinate and supervised entities for purposes of imposition of attorney discipline, the State Bar of California and the State Bar Court.

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Petitioner Damer respectfully urges this Honorable Court to grant this Petition for Writ of Certiorari, seeking review of THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA, REVIEW DEPARTMENT OPINION ON REVIEW, No. 90-0-15007 (Published as "In the Matter of Respondent X, A Member of the State Bar" 3 Cal. State Bar Ct. Rptr. 592 (1997), and, in Westlaw, as 1997 WL 90832 filed February 26, 1997). This OPINION is attached as APPENDIX D. Petitioner filed a request for reconsideration of this opinion, which was denied by order filed April 14, 1997. (APPENDIX B). A challenge to the OPINION of the California State Bar Court was presented to the California Supreme Court, pursuant to California Attorney Admission and Discipline Rules 951 and 952. The California Supreme Court, by order filed on December 23, 1997, denied review, thereby adopting the OPINION. (APPENDIX A).

JURISDICTIONAL STATEMENT

28 United States Code §1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution."

Petitioner has raised below, and preserved, challenges under the United States Constitution, Amendments 1, 5, and 14 (in the California Supreme Court and the required lower state courts). (See APPENDIX C, and APPENDIX D, p. 29).

CONSTITUTIONAL PROVISIONS INVOLVED (emphasized below)

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

And, the first section of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In August of 1990 Petitioner Nicholas Damer was held in contempt for disobeying a post-trial "gag" order issued only as part of a "confidential settlement" from which he had strongly dissented in the related San Francisco Superior Court legal malpractice suit where he had represented the plaintiff. For purposes of the present Petition, the relevant portion of the "gag" order, which Petitioner disobeyed, was intended to prevent Petitioner from providing, to a judge in neighboring Contra Costa Superior Court, evidence of fraud by the lawyer and public figure sued for malpractice in the San Francisco case. This evidence of fraud was obtained by Petitioner outside of the discovery process and thus not subject to protective orders under Seattle Times v. Rhinehart, 467 U.S. 20, 37 (1984).

Petitioner unsuccessfully sought appellate review of both the superior court order he was charged with violating, and the contempt judgment. The constitutionality of the superior court order, or of the contempt judgment, was never determined, and no appellate court ever addressed the merits of any of Petitioner's constitutional or other points.

Following the contempt judgment, the Chief Trial Counsel of the State Bar of California charged Petitioner with three counts of violating his duty, under California Business and Professions Code §6103, to obey court orders issued in connection with his practice of law, which Petitioner, in the words of the statute, "ought in good faith" to have obeyed. Trial counsel sought Petitioner's disbarment. The hearing judge held Petitioner culpable of misconduct under one count, and ordered a private reproval, and that he take and pass an ethics course.

The Review Department upheld the hearing judge's reproval, on different grounds, but deleted the requirement that Petitioner take and pass a course in ethics. In the majority opinion, the Review Department refused to directly consider the validity of the superior court order, or of the contempt finding, although many of the terms of the confidential settlement were incidentally noted, in the Opinion, as unethical, unconstitutional, or both.

Petitioner requested reconsideration of the Review Department's decision, which was denied by order filed April 14, 1997. A petition for review of the State Bar of California's Review Department was presented to California Supreme Court but was denied by order of December 23, 1997.

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REASONS TO GRANT THIS PETITION

Petitioner has been disciplined for failure to obey a Superior Court order, obtained as a part of a "confidential" settlement, some of whose terms the State Bar Court found to be lawfully unenforceable in their attempts to impose limitations upon Petitioner. Nevertheless, the State Bar Court held that Petitioner should be disciplined for failure to obey the order because he "ought in good faith" to have complied. The State Bar Court at the same time implicitly found that formulation of the settlement agreement, by the other involved attorneys, merited further disciplinary investigation not of Petitioner, but of his adversaries. Petitioner had objected to "secrecy" provisions of the settlement and any order meant to implement them. Neither the validity of that order, nor its effect on Petitioner's constitutional rights, was ever resolved, either by the panel of the California State Bar Court Review Department in imposing ultimate discipline, or in collateral contempt or appellate proceedings.

Petitioner contends that California Business and Professions Code §6103 [hereinafter referred to as §6103] is so riddled with ambiguity that it is void for vagueness, and presents a continuing danger of arbitrary and capricious prosecutions, such as in this case, where an attorney's exercise of free speech, in reporting a prominent attorney and a public figure's misconduct to the judiciary, has been compromised.

Petitioner was disciplined even though his actions were explicitly and implicitly found to be "principled," "primarily in the interest of others," and in total subjective good faith, and even though those actions were completely ethical under the Model Rules of the American Bar Association, which contrast sharply with California's comparable rule.

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Petitioner further contends that imposing discipline -- without consideration of Petitioner's rights or of the constitutional validity of the Superior Court order -- violates the First, Fifth, and Fourteenth Amendments, and is contrary to this Court's holding in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner does not contest most of the findings and historical recitations made by the California State Bar Court Review Department in the Review Department's OPINION (APPENDIX D, pp 6-25). Except where noted, the facts detailed below summarize the OPINION's findings.

August 1983 to March 5, 1990

From 1983 to 1990, Petitioner represented a plaintiff in attempts to recover malpractice damages from the lawyers who had represented her after she was seriously injured in a 1980 automobile accident. The lawyers sued for malpractice were well known in the area, and the case, venued in San Francisco Superior Court, attracted major media attention. During the trial of the malpractice action, the defendant lawyers were being independently accused by others of demanding unwarranted costs in another case pending in Contra Costa Superior Court, where defendant lawyers' firm was acting as court-appointed "Head of the Plaintiffs' Steering Committee" for victims of a 1985 airplane crash.

Petitioner is a licensed attorney and also a licensed private investigator. Using specialized skills, Petitioner was able to obtain "strong evidence, outside of normal discovery channels ... that the firm

routinely charged, and collected from, their clients, bogus or inflated investigative costs and expenses." (see APPENDIX D, p. 7, and the related n.6).

Settlement Negotiations

Just before trial Petitioner hired Maryland and another California counsel to assist him in presenting the malpractice case to the jurors, with the agreement and understanding that Petitioner would remain in charge of the case. Nevertheless, in his absence, on March 6, 1990, Petitioner's co-counsel bargained, with the defendant attorneys' firms, their lawyers, and their insurer, for a "confidential" settlement, involving exhaustive and unusual secrecy provisions.

Rightly suspecting that Petitioner would object to the terms of the settlement, the agreement included a provision whereby the plaintiff would not forfeit entitlement to settlement monies on account of any violation, by Petitioner, of the secrecy schemes.

The agreement also included a provision whereby Petitioner's name would be deleted from the $750,000.00 check to be paid via the settlement, thus potentially depriving him of fees earned in seven years of representation. (APPENDIX F). Accordingly, Petitioner indicated he would attempt to impose a lien for his fees on any sums due any of the settling parties from any source whatsoever.

Formal Affirmation Of Settlement; Petitioner's Dissent And Attempt To Withdraw

The next morning, March 7, 1990, upon learning of the settlement and its terms, Petitioner immediately disapproved, objected to the non-monetary settlement terms on ethical grounds,

attempted to obtain permission to document the proceeding for appeal, and moved to withdraw as counsel for plaintiff. Petitioner's request to make a record of the hearing was denied, as was his initial motion to withdraw as plaintiff's counsel.

That same morning, the superior court judge accepted the parties' settlement agreement. As a part of the settlement orders, the judge ordered that all court records in the case be sealed, including transcripts; that all of the "real parties in interest" and their attorneys were bound by the settlement terms; ordered Petitioner to turn over all copies of all of his files to opposing counsel; and granted a motion for nonsuit. The judge then dismissed the jury, ordering them not to disclose anything witnessed during the trial, to anyone; declared the case "settled"; and allowed Petitioner to withdraw.

The Superior Court judge then ordered the parties and Petitioner to brief the issues Petitioner raised regarding the confidentiality and turnover provisions of the settlement, and to return the next day for argument. Closed court proceedings regarding the settlement were held March 8 and 9, 1990. At those proceedings, Petitioner appeared with counsel, and vigorously argued that the settlement was constitutionally and ethically infirm.

Pressure Against Petitioner to Accept the Settlement Terms, Including Threats of State Bar Prosecution

In addition to the attempt to deny Petitioner any portion of the settlement proceeds due from his years of work on his former client's case, Petitioner was also threatened with jail and even disbarment. Petitioner was informed that disciplinary proceedings would be instituted, and that if he did not comply

with all portions of the settlement terms, he would "wind up having his ticket pulled." (APPENDIX E).

The Settlement Agreement, in Relevant Part

Petitioner challenged a number of the terms of the settlement agreement, as set forth on the record of March 7, 1990, and detailed in the Review Department OPINION. Those relevant to this Petition are detailed below.

First, there was a provision that required the parties and their attorneys to keep the settlement agreement and its terms strictly confidential, unless disclosure was necessary in application for personal liability insurance, or ordered by a court in subsequent litigation.

A second provision sealed the entire case file, and a related provision instructed jurors never to disclose to anyone any evidence that they witnessed. The order sealing the case file was filed March 16, 1990, and was served by mail upon Petitioner March 23, 1990. Upon subsequent litigation by the California First Amendment Coalition and the San Francisco Banner Daily Journal, the "gag" order against the jurors was lifted and the order sealing the case file was modified to seal only specified documents.

Another provision prohibited Petitioner from soliciting any of the firm's former, current or future clients for the purposes of any similar fraud or malpractice claims against the defendant attorneys in the malpractice action, and also prohibited Petitioner from using or communicating, directly or indirectly, to any person including other judicial officers, any information he had gained from any and all sources.

The Contra Costa Cases Nexus

Petitioner had a reasonable basis for sharing information with the Contra Costa Superior Court.

Before the "settlement," there had been widespread publicity about accusations against the defendant law firm in the legal malpractice case, which had, in 1986, been appointed as the Head of the Plaintiffs' Steering Committee in the Sun Valley Mall Air Crash Disaster cases in Contra Costa County. Specifically, in the Contra Costa matters, the firm was accused of attempting to collect, from the settlement funds deposited for the plaintiffs in those cases, the exact type of "phony" and otherwise unjustified expenses that Petitioner's evidence indicated had been "routinely charged" during at least the most recent preceding decade. A hearing critical to collection of @$250,000.00 of these "expenses" was set in Contra Costa Superior Court for March 19, 1990.

Suppression of evidence, highly relevant to the expenses claimed by the "Head of the Plaintiffs' Steering Committee" firm in the Contra Costa case, was an admitted objective of the settlement and the timing of the mid-trial disposition of the case in the San Francisco Superior Court involving Petitioner.

Petitioner's submissions to Contra Costa Superior Court Judge Richard Patsey

Petitioner's conduct, for which he received a private reproval, consisted of actions he took on March 16, 1990 and March 23, 1990, when he communicated with Contra Costa Superior Court Judge Richard Patsey, who was presiding over

hearings regarding challenges to the "Head of the Plaintiffs' Steering Committee" costs and fees in the Sun Valley cases.

The first communication was hand-delivered Friday, March 16, 1990. This communication consisted of a letter from Petitioner to Judge Patsey, in an attempt by Petitioner to prevent collection of the "Head" firm's false billing in the Sun Valley cases, and in an attempt to protect Petitioner's fees earned in the San Francisco case (i.e., by asserting a lien only on any sums rightfully claimed by the "Head of the Plaintiff's Steering Committee"). Accompanying this letter were copies of the supporting documents in a separate, sealed envelope. Judge Patsey returned these items unread, indicating they would be considered only if filed and served, rejecting Petitioner's suggestion that the materials be kept in confidence or under seal in deference to the wishes of the San Francisco court.

Petitioner's second communication, on March 23, 1990, initiated the filing of the motion for lien re his fees, in the manner stated in writing by Judge Patsey on March 22; namely, with due service on all parties to the Sun Valley case, after allowing Real Parties, prior to said service, ample opportunity to persuade Judge Patsey to refuse to accept anything except under seal and to excuse the need for service.

The above pages demonstrate, by themselves, the history necessary to compel this conclusion: that all Petitioner's conduct was constitutionally protected activity, and that all was undertaken in absolute subjective good faith. In fact, as noted in the OPINION, Petitioner's was a "principled approach to the basic settlement and the confidential terms which were a part of it" and were part of his "sincere beliefs

he was acting in support of sound public policy" including the conduct involved in "revealing the confidential information to the judge in airplane crash case." (APPENDIX D, p. 30). For the following reasons, no discipline can be constitutionally imposed.

ARGUMENT

I. CALIFORNIA BUSINESS AND PROFESSIONS CODE §6103 CAN NOT BE A CONSTITUTIONAL BASIS TO DISCIPLINE AN ATTORNEY BECAUSE THE STATUTE'S "OUGHT IN GOOD FAITH" LANGUAGE DOES NOT FURTHER ANY COMPELLING STATE INTEREST, AND DENIES APPLICABLE GUARANTEES OF FREEDOM OF SPEECH, DUE PROCESS, AND EQUAL PROTECTION, AND IS FATALLY OVERBROAD.

A. California Business and Professions Code §6103 and its application.

California Business and Professions Code §6103 provides, in relevant part, that "A wilful disobedience or violation of an order of the court requiring [the attorney] to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, . . . constitute[s] cause for disbarment or suspension."

When "ought" an attorney, "in good faith" obey a court order, or be subject to possible suspension or disbarment?

The State Bar Court Review Department, following People v. Gonzalez, 12 Cal.4th 804 (1996), and In re Establishment Inspection of Hern Iron Works, 881 F.2d 722 (9th Cir. 1989), holds in its majority opinion that if an order is void, an individual may not be punished with contempt for disobeying it.

The Review Department also held that even a sincerely held subjective good faith belief that the order is void is not a defense to any Business & Professions Code §6103 charge. See, also, Matter of Klein, 3 Cal. State Bar Ct. Rptr. 1 (1994). Additionally, the majority opinion of the Review Department holds in Petitioner's case that even though no court ever ruled on the validity of the superior court settlement order, Petitioner had a process for discretionary, not mandatory review, and when unsuccessful, could be disciplined for failure to follow the order, valid or not, and even though all appellate courts' dispositions were summary and without consideration of the merits.

Business and Professions Code §6103 "ought in good faith" language (first enacted in 1873) is unconstitutional both on its face, and as applied to Petitioner.

B. The Requirement of "Good Faith" Obedience to a Court Order is Unconstitutionally Vague.

1. The Vagueness Standard.

Vague laws are infirm because their imprecision fails to give fair notice to those who would obey them, and because their ambiguity permits discriminatory enforcement. Kolender v. Larson, 461 U.S. 352, 358-59 (1983).

This Court has specifically held that rules governing attorney discipline may not be so vague that they provide insufficient guidance to practitioners regarding what conduct is prohibited. As Justice O'Connor noted in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), supra:

> "I believe that Nevada's rule is void for vagueness. ... Both Gentile and the disciplinary board have valid arguments on their side, but this serves to support the view that the Rule provides insufficient guidance. As Justice Kennedy points out, a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement." (501 U.S. at 1082).

As this Court has noted, vagueness in a regulation or statute, particularly where severe sanctions may be imposed, "raises special First Amendment concerns because of its obvious chilling effect on free speech." Reno v. American Civil Liberties Union, ___ U.S. ___, 117 S.Ct. 2329, 2344-45 (1997).

2. §6103 Fails to Give Adequate Notice to Practitioner Regarding What Conduct is Prohibited.

As construed by the State Bar Court, §6103 is also constitutionally infirm for failing to give fair notice of disciplinable acts. As demonstrated by the State Bar Court Review Department's OPINION, the State Bar Court hearing judge, and two opinions by the panel members of the Review Department,

differing conclusions regarding Petitioner's alleged disobediences were reached. Some of those alleged disobediences were held to be culpable, and some were not. The grounds for culpability and non-culpability varied.

Thus, as was the case in Gentile, different Judges who analyzed Petitioner's circumstances came up with differing views of what conduct was sanctionable, thus showing how infirm §6103 is. If reasonable minds could differ over the application of the statutory "good faith" language in the same set of circumstances, Petitioner has not been given fair notice regarding what actions would or would not be allowed, nor would any other attorney in a different set of circumstances, given the ambiguity of the statute.

Section 6103 further fails to give adequate notice to practitioners in that it is in apparent conflict with other statutory directives. Here, the settlement terms ordered, in addition to violating the Constitution, violated a number of rules of professional conduct and duties imposed under the California Penal Code. Specifically, the orders violate California Rule of Professional Conduct 1-500 (barring settlements designed to restrict any party's lawyer's right to practice law); duties imposed by California Penal Code §§135, 136.1(c)(2) and (4), 138 et sequitur (proscribing the suppression and destruction of evidence and the intimidation and bribery of witnesses, conspiracy toward that end for pecuniary gain, and other such "CRIMES AGAINST PUBLIC JUSTICE" (see heading of Title 7 of California Penal Code); both California Rule of Professional Conduct 1-120 and Rule 5-220 (directing counsel not to "knowingly assist in ... any violation of these Rules" [1-120] to "suppress any evidence the member ... has

a legal obligation to reveal or produce"[5-220]); and the right to disclose otherwise confidential facts where necessary to protect counsel's interests in fees (Comment, California Evidence Code §958).

The negative import of "secret settlements" has been recognized in Rhode Island. There, the Rhode Island Supreme Court stated that the "failure of the legal profession to regulate itself effectively fuels the perception that under a cloak of confidentiality, the legal profession is engaged in a coverup of attorney misconduct." ETHICS ADVISORY PANEL OPINION 92-1 (1993, Rhode Island Supreme Court) 627 A.2d 317, 322.

Here, after seven years of Petitioner's persistence in speaking out regarding this settlement, the State Bar Court Review Department found probable cause to refer the allegations of unethical conduct for further investigation, not of the Petitioner, but of the other attorneys who agreed to the settlement. (APPENDIX D, p. 7, n.6.) Thus, both compliance with the settlement orders, and defiance of it, merited at least a disciplinary investigation, further proving that the orders were vague.

The danger of this ambiguity is that because of the severity of the possible sanctions -- suspension or disbarment from the practice of law -- and the lack of guidance as to what speech or conduct might be subject to discipline, a situation has been created whereby an attorney would be unlikely to ever challenge, with forthright disobedience, any court order, no matter how unconstitutional or otherwise illegal the order appears to be.

C. The Regulation of Attorney Speech and Conduct May Not Include Punishment For Activities Protected by the First Amendment, As Were Petitioner's Activities.

1. Free Speech by an Attorney is Protected, and May Not Subject an Attorney to Discipline.

Free speech by an attorney, even where attorney discipline is contemplated, is protected by the Constitution. In Gentile, 501 U.S. at 1054, the Court stated:

> "At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."

As to speech by attorneys in other contexts, this Court held that "[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995).

Other speech by attorneys is also protected. For example, commercial speech by attorneys -- e.g., in the form of advertising is generally protected.

Florida Bar v. Went For It, Inc., 515 U.S. at 623; Bates v. Arizona, 433 U.S. 350 (1977); Shapiro v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

Thus, the standard is clear: an attorney cannot be disciplined for activity protected by the First Amendment of the Constitution.

2. Petitioner's Communications with Judge Richard Patsey Were Protected.

Petitioner was disciplined by the Review Department in part for violation of his duty not to reveal "evidence obtained in the case, except as allowed by the civil settlement judge." (APPENDIX D, p. 29).

"[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979). More specifically, evidence obtained outside of discovery, or admitted into a public trial, is generally not subject to protective orders of any type, stipulated or otherwise once the case has been concluded. See, e.g. Seattle Times v. Rhinehart, 467 U.S. 20, 37 (1984); Raymond Handling Concepts v. Superior Court, 39 Cal. App.4th 534, n.2, 45 Cal.Rptr.2d 9885 (1996).

To restrain the publication of anything that occurred in an open court proceeding plainly violates First Amendment principles, as this Court has held regarding the Nevada State Bar's "gag" rules in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), and as the California courts have held in Marriage of Candiotti, 34 Cal.App.4th 718, 724, 40 Cal. Rptr. 299 (1995), cited by Judge Obrien (OPINION, p. 12). In Candiotti, the trial court's

restriction on a party's free speech rights included not just a ban on discussing information obtained only through discovery (and not yet made a part of a public proceeding) but also information "obtained by Debra's [appellant Candiotti's] private investigator" (see n.5 to opinion); and the opinion held: "That part of the [trial court] order banning dissemination of independently acquired materials is reversed."

The evidence revealed by Petitioner to Judge Patsey was obtained through Petitioner's investigative work, outside of the discovery process. Additionally, much of the evidence was repeated in and testified to in open court, and also was in public records of the appeals pending, in Seward v. Sterns, years before the "secret settlement." Here, the State Bar has never contended, much less made factual findings, that what Petitioner shared with Judge Patsey was anything other than evidence already part of the public domain and/or obtained outside of "discovery."

As the concurring opinion by Judge Obrien held "To the extent ... the order purported to prohibit [Petitioner] from distributing information or records that he lawfully obtained outside of the discovery process I would hold it not a matter for disciplinary purposes in seeking culpability under section 6103"; and Judge Obrien also observed that the settlement scheme "raises a question of whether the agreement proposed by [those being sued] and ordered [enforced] by the trial court was violative of ... rule 1-500(A) of the Rules of Professional Conduct. ... I would hold that the above portion of the order may not give rise to disciplinary sanctions under section 6103 under the circumstances of this case." (APPENDIX D, p 35).

Thus, Petitioner's speech and conduct was protected, and can not be subject to discipline without violation of the First Amendment.

3. Petitioner Was Entitled to Reveal the Amount of the Settlement.

Petitioner was also subjected to discipline for revealing the settlement amount to the Contra Costa court.

Generally, California law allows an attorney to reveal a settlement amount when seeking to recover under a fee contract. See, e.g., California Evidence Code §958. Likewise, Petitioner's point is confirmed, here, by the American Bar Association's Disciplinary Rules; see DR 4-101, regarding the duty of "Preservation of Confidences and Secrets of a Client". Under subdivision (C) of DR 4-101, "A lawyer may reveal: ...(4) Confidences or secrets necessary to establish or collect his fee". ABA Model Rule 1.6 -- on "Confidentiality of Information" -- also allows that "A lawyer may reveal such [otherwise confidential] information to the extent the lawyer reasonably believes necessary: ... (2) to establish a claim ... on behalf of the lawyer in a controversy between the lawyer and the client". The final comment on Model Rule 1.6 clarifies that "With regard to Rule 1.6(b)(3) [sic] DR 4-1-1(C)(4) provides that a lawyer may reveal 'confidences or secrets necessary to establish or collect his fee or to defend himself ... against an accusation of wrongful conduct'."

Here, although the OPINION omits mentioning the scheme to wrongfully deprive Petitioner of a fee for seven years' labors, the DECISION of Hearing Judge Goldhammer makes the

following finding: "[Petitioner's] former co-counsel [Robert Denebeim], had determined not to name [Petitioner] in the settlement check and he, not unreasonably, had asserted an equitable lien interest in the settlement proceeds." (APPENDIX F). Thus, Petitioner was legally entitled to reveal the settlement amount.

Further, inasmuch as Petitioner's conduct was to petition a court for redress of grievances against the victims of the airplane crash, and as to his own grievance regarding his collection of his fees, his First Amendment right to petition the Government for a redress of grievances was violated. It is also noteworthy that the Contra Costa judge declined to sanction Petitioner for actions in that court. (OPINION, p. ____).

D. The State Bar, and Its Court's Interpretation of §6103's "Ought in Good Faith" Language Violates the Constitutional Rights to Due Process and Equal Protection.

Although the State Bar Court found that Petitioner "held sincere beliefs that he was acting in support of sound public policy by revealing the confidential information to the judge in the airplane crash case," (APPENDIX D, p. 30). the Court also held that this subjective good faith is not a defense to any Business & Professions Code §6103 charge. See, also, Matter of Klein, 3 Cal. State Bar Ct. Rptr. 1 (1994), cited in the APPENDIX D, p. 27.

However, the State Bar Court has ruled that subjective good faith is a permissible defense to disciplinary charges in other and similar situations.

In Matter of Respondent P., 2 Cal.State Bar Ct.Rptr. 622, 630 (1993), for example, the State Bar Court noted the rule that would be applied to charges a lawyer had mistakenly violated a statute; namely, that if a mistake in law was made in good faith, it may be considered as a defense in determining whether discipline should be imposed for acts done through the mistake. In short, Respondent P's good faith could be a defense to charges he had violated §6068(a) of the Welfare & Institutions Code; but Petitioner's good faith belief that the oral, unwritten, undocumented settlement orders violated the Constitution and state statutes is not a defense, even though Petitioner's objections were implicitly and explicitly found valid.

There is no rational basis for distinguishing between §6068 and §6103 in terms of allowing a "good faith" defense, especially when the "court order" disobeyed had nothing whatsoever to do with controlling the conduct of a lawyer in a courtroom during a trial. This good faith conduct is recognized in American Bar Association (ABA) Model Rule 3.4, permitting an "open [outspoken, not covert] refusal [to obey orders and rules] based on an assertion no valid obligation [to obey] exists," and ABA DR 7-106(A).[1]

---

[1] The full text of Rule 3.4(c) is: "A lawyer shall not: ...(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion no valid obligation exists." The ABA disciplinary rule, DR 7-106(A), says "A lawyer shall not disregard ... a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such ... ruling." Petitioner took all steps available before continued compliance, with the settlement ruling, would have worked a fraud on Contra Costa Superior Court.

Further, this holding is inconsistent with the latitude accorded California lawyers respecting rights to pursue a post-trial appeal (see, e.g., Marriage of Flaherty, 31 Cal.3d 637, 183 Cal.Rptr. 508 (1982), holding that counsel's conduct can be sanctioned only if done for an improper motive or only if "any reasonable attorney would agree" that the conduct had no merit). ABA Model Rule 3.4, and disciplinary rule DR 7-106(A), and allows open refusal of order based on the assertion that no valid obligation exists, as discussed supra.

The absence of a rational basis, for allowing "good faith" as a defense to violating a statute but not for disobeying an order, works to deny Petitioner, and others like him, due process and equal protection.

Additionally, it is obvious that if jurors, or other observers of the San Francisco superior court proceedings, had attempted to tell the Contra Costa judge what evidence was introduced at trial, that any punishment meted out to them would be held unconstitutional. Petitioner would vigorously argue that where an attorney's special duties incumbent upon the practice of law are not implicated, an attorney has the same legal rights as any non-attorney, and that to hold differently violates Petitioners' rights to due process and equal protection.

Finally, the imposition of punishment upon Petitioner, without the even the barest consideration as to whether his constitutional rights have been violated, is in itself a violation of due process.

II. ALTHOUGH SOME ATTORNEY CONDUCT MAY BE REGULATED, PETITIONER'S CONDUCT DOES NOT FALL WITHIN THAT REALM.

Petitioner does not contest the well settled principle that where constitutional issues are not implicated, attorneys are subject to a number of requirements regarding the practice of the legal profession. Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975); Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 460 (1978); Cohen v. Hurley, 366 U.S. 117, 124 (1961). Petitioner further acknowledges that even when a matter has concluded, an attorney owes some continuing duties to his or her former client. See, e.g., Hughes v. Superior Court, 106 Cal.App.3d 1 (1980).

It is anticipated an attempt to justify the discipline imposed against Petitioner will be made on two grounds.

One justification, noted by Judge Obrien in his concurring opinion, is that a potential for an adverse impact upon a former client may be the basis for the imposition of discipline. (APPENDIX D, pp. 33, 34). However, in this case, the settlement itself specified that there would be no adverse impact to Petitioner's former client from Petitioner's actions, and an unsuccessful attempt was made to void the settlement on the grounds of Petitioner's conduct in the settlement hearings on March 8 and 9, 1990. Thus, no special duty of Petitioner exists on this grounds, and this does not properly justify any infringement of Petitioner's

constitutional rights. Furthermore, "[w]hile clients have the sole right to accept a settlement offer, a lawyer cannot be forced to violate rules of professional conduct." Pitulla, Joanne, Co-Opting the Competition: Beware of Unethical Restrictions in Settlement Agreements, AMERICAN BAR ASSOCIATION JOURNAL, Aug. 1992, p. 101.

A second justification, for the discipline imposed, is the State Bar's contention that an attorney may be punished for non-obedience to a court order, even while review of the order was being sought, and even when no determination as to the validity of the order is obtained. While rejecting the "collateral bar rule," requiring an individual to comply with an order until successfully challenged, the Review Department goes further to hold that upon exhaustion of appellate review, even without a determination as to the validity of the order, Petitioner may be disciplined.

However, it has been held by this Court that the state's interest in preserving the integrity of the judiciary is not sufficiently compelling to justify the imposition of punishment for truthful speech. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Craig v. Harney, 331 U.S. 367 (1947).

There is no legal justification for the imposition of discipline against Petitioner in these circumstances.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the writ of certiorari be granted.

Respectfully submitted,
March 23, 1998

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In Propria Persona

APPENDIX A

Filed Dec 23 1997
Robert Wandruff Clerk
Deputy

No.

S060957

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF RESPONDENT X, A MEMBER OF THE STATE BAR OF CALIFORNIA

Petition for writ of review DENIED.

GEORGE
Chief Justice

APPENDIX B

Filed Apr 14 1997
State Bar Court
Clerk's Office, Los Angeles

REVIEW DEPARTMENT OF THE STATE BAR COURT

IN BANK

In the Matter of NICHOLAS RAYMOND DAMER

A Member of the State Bar

90-O-15007

ORDER

Nicholas Raymond Damer's motion filed March 18, 1997, seeking reconsideration of our opinion filed February 26, 1997, is DENIED, no new or different facts, circumstances or law having been shown. In view of this ruling, the State Bar's motion for an extension of time to respond to the motion for reconsideration is dismissed as moot.

James W. Obrien, P. J.

APPENDIX C

(Extracted from request for reconsideration of State Bar Court Review Department)

STATE BAR COURT
STATE BAR OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of NICHOLAS RAYMOND DAMER, No. 52309,

(aka "RESPONDENT X")

A Member of the State Bar.

NO. 90-0-15007

REQUEST FOR
RECONSIDERATION PURSUANT TO RULE 309 OF THE RULES OF PROCEDURE FOR THE STATE BAR COURT

(Re: Opinion filed and served by mail on February 26, 1997, and published at 97 Daily Journal D.A.R. 1371)

... But most importantly, both the contempt hearings and the petitions relating thereto occurred months after whatever actions that may reasonably be deemed to be the conduct that violated §6103; and a lawyer must be in a position, at the time he must decide what to do, to assess threats that he might end up "having his ticket pulled."

This is the rationale behind the American Bar Association's Model Rules, which specifically allow Respondent to do, and to do with ethical confidence, exactly what was done here; namely, to engage in an "open [i.e., not covert] refusal [to obey orders and rules] based on an assertion no valid obligation [to obey] exists";

see Rule 3.4. Respondent has consistently contended, from his first Answer to the present, that any other interpretation of Business & Professions Code §6103 would be blatantly unconstitutional under provisions of both the California and United States Constitutions – especially where a purported "order" challenged is one that restrains the enjoined party in ways meant to ban meaningful timely appeals. Any other interpretation, in this case especially, defeats rights to due process, rights to speak freely on matters of public concern, and rights to enjoy the equal protection of the law free from caprice. ....

p. 19-20 (footnotes omitted).

Dated: March 17, 1997

Respectfully submitted:

_____

Harold Justman
Attorney for Respondent In Propria Persona

APPENDIX D

97 Cal. Daily Op. Serv. 1855,
3 Cal. State Bar Ct. Rptr. 592, 97 Daily Journal D.A.R. 3171
(Cite as: 1997 WL 90832 (Cal.Bar Ct.))

In the Matter of RESPONDENT X, A Member of the State Bar.

No. 90-O-15007.

Review Department of the State Bar Court of California.

Feb. 26, 1997.

Mark B. Fredkin, Special Examiner for Office of Trial Counsel, San Jose, for State Bar of California.

Respondent X, in pro. per.

OPINION ON REVIEW

STOVITZ, Judge.

*1 In this matter the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charged respondent X [FN1] with three counts of violating his duty, under Business and Professions Code section 6103, [FN2] to obey court orders issued in connection with his practice of law. The hearing judge, however, held that respondent was culpable of misconduct under only one of the counts. [FN3] Under that count, the hearing judge held that respondent violated section 6103 by deliberately violating the confidentiality provision of a superior court order enforcing the settlement agreement in a legal malpractice lawsuit in which respondent represented the plaintiff. That confidentiality provision purported to prohibit respondent from discussing the case or its settlement with anyone other than the district attorney's office or the State Bar.

FN1. Since this proceeding did not result in the imposition of any public discipline, we follow our usual practice of not identifying the respondent in this published opinion. (See, e.g., In the Matter of Respondent M (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.) The proceeding is, however, public.

FN2. Unless otherwise noted all future "section" references are to sections of the Business and Professions Code.

FN3. The other two counts were implicitly dismissed when the hearing judge refused to find respondent culpable under them. The State Bar has not sought review and we adopt that disposition.

The hearing judge ordered respondent privately reproved. After independently reviewing the record in this very unusual case on the respondent's request for review, [FN4] we adopt most of the hearing judge's findings, affirm the hearing judge's decision and impose a private reproval.

FN4. The State Bar did not seek review, but urged that we uphold the hearing judge's decision.

I. STATEMENT OF FACTS

A. The Legal Malpractice Lawsuit

In 1984 Maria S (hereafter "S") hired respondent to file a lawsuit against a number of individuals who were involved in a prior lawsuit she brought to recover damages she suffered in an automobile accident. Thereafter, in July 1984 respondent filed such a lawsuit for S in San Francisco Superior Court. The suit included legal malpractice claims against the partners of the firm of attorneys that represented S in her prior personal injury lawsuit. [FN5]

FN5. Later references to these defendant attorneys or their law firm will be to "the firm" or "firm partners" even though S did not sue the firm as an entity.

In her malpractice lawsuit, S alleged: (1) that the firm did not adequately handle and prepare her personal injury case for trial; (2) that the firm charged and collected, from her, bogus or fraudulently inflated costs and expenses in that case; (3) that one of the firm's partners advised her to accept a $100,000 pre-trial, settlement offer in that case to cover his and another partner's failure to prepare her case for trial; (4) that she accepted the $100,000 settlement only because of the partner's advice; and (5) that, if the firm had properly prepared her case for trial, she would have recovered at least $200,000 or $300,000.

After he filed the malpractice lawsuit, respondent obtained strong evidence, outside of normal discovery channels, including from a former secretary of the firm who was the widow of a firm partner, that the firm routinely charged, and collected from, their clients, including S, bogus or inflated investigative costs and expenses. [FN6] This information was obtained only on assurance of anonymity to the informant.

FN6. Concurrently with the filing of this opinion, we refer to the Office of the Chief Trial Counsel for appropriate investigation and action, the matter alleging that these members of the State Bar engaged in unethical conduct not only as to the matters set forth here but as to an alleged violation of former rule 1-500, Rules of Professional Conduct, discussed post, page 11. (See Rule Proc. of State Bar, title II, State Bar Court Proceedings, rule 218.)

S claimed in her malpractice lawsuit, that the firm never informed her that they would or did charge her a "marked

up" price for the investigative costs and expenses they incurred on her behalf. She also claimed that the firm's surreptitious "mark ups" violated the plain language of their fee agreement.

*2 According to respondent, the firm converted from S slightly over $1,000 in investigative services billed to her but not paid for investigative work.

Shortly before trial, respondent retained, at his own expense and in accordance with his fee agreement with S, one local attorney and one out-of- state attorney as co-counsel. Both co-counsel agreed that respondent would remain the lead attorney on the case. It is not disputed that the out-of-state attorney was permitted to appear in the case pro hac vice. [FN7]

FN7. See California Rules of Court, rule 983.

B. Settlement of the S Suit and the Imposition of a Confidentiality Order

Within days of a conversation respondent had with the former law firm secretary, the parties resumed settlement negotiations in mid-trial. Then, on the afternoon of Tuesday, March 6, 1990, the parties engaged in settlement discussions before the superior court. Respondent left during that discussion at 5:30 p.m. because of a prior family commitment. However, before he left, he instructed his two subordinate co-counsel not to continue the discussions in his absence. Respondent gave that instruction, at least in part, because he believed that S was under too much stress to rationally continue discussing settlement.

However, respondent's two co-counsel, continued the discussions in respondent's absence with the superior court's "approval." Sometime around 8 p.m. that evening, the parties reached a tentative settlement agreement in

which S would receive a total sum of $750,000 from firm partners and their insurance carrier. Before dismissing the parties that night, the superior court told them that, if the settlement agreement was not finalized by 9:30 the next morning, testimony would promptly resume.

Respondent did not learn of the tentative settlement agreement until he returned to court the following morning, Wednesday, March 7, 1990. While the terms of the settlement agreement were being read into the record, respondent requested permission to tape record the proceeding because one of the settlement terms was that the entire record in case would be sealed, and respondent wanted to make sure he had a record of the proceeding available to him in case of an appeal. The superior court refused respondent's request. [FN8]

> FN8. See California Rules of Court, rule 980(c) [a party may tape record a court proceeding to aid in note taking unless otherwise ordered by the court].

After all of the settlement terms were read into the record, all of the parties and attorneys except respondent accepted them on the record. Respondent disapproved and objected to them. [FN9] He also stated that, in his view, S was too distraught from the pressures of trial and the discord among her three attorneys to be capable of giving her informed consent to any settlement at the time.

> FN9. In so doing, he told the superior court "that I do not assign to my client the right to bind me personally as a party to this settlement ...."

According to one law firm partner, his original attorney in the malpractice case improperly turned over to respondent during discovery, a large amount of allegedly confidential firm information (financial and personal) that was private and privileged without objection, confidentiality agreement, or protective order. According

to this partner's admissions before the superior court, one of the primary reasons that he agreed to settle the malpractice case and to force his insurance carrier to pay S such a large sum of money, was to buy his peace and get back all of those allegedly confidential records.

*3 There were at least seven separate provisions in the settlement agreement that collectively (if not individually) affected the evidence in the case. Moreover, at least three of those provisions also purported to adversely affect respondent's personal rights as if he were a party to the litigation or the settlement agreement.

First, there was a provision that required the parties and their attorneys to keep both the existence of the settlement agreement and its terms strictly confidential unless it was necessary to disclose them on an application for professional liability insurance or their disclosure was ordered by a court in "some other subsequent litigation."

Second, there was a provision requesting the superior court to seal its entire file in the case. A third provision requested the superior court, before dismissing the jury, to inform it that the case had been disposed of without its assistance and to instruct each member of it never to disclose any of the evidence they heard to anyone.

A fourth provision required the parties to terminate the suit (1) by S immediately resting her case once the superior court accepted the settlement agreement; (2) by the firm then moving for nonsuit, which S was not to oppose; and (3) by the superior court immediately granting the unopposed motion for nonsuit, entering a judgement of nonsuit, and sealing its entire file in the case. [FN10]

> FN10. Under Code of Civil Procedure section 581c,subdivision (c), a judgment of nonsuit operates as an adjudication

upon the merits unless the court expressly provides otherwise. Under a judgment of nonsuit, the firm would not have to report the $750,000 malpractice settlement to the State Bar under Business and Professions Code section 6068, subdivision (o)(2). Nor would the superior court have to report it to the State Bar under Business and Professions Code section 6086.8, subdiv (a).

A fifth provision required S to transfer ownership "of her complete files, all copies of her files," in or relating to the malpractice lawsuit (except her personal medical records) to the firm and directed all three of her attorneys to give all of her original files and all copies of them to the firm. [FN11]

> FN11. According to the firm's assertions in superior court, the turnover provision required respondent to turn over every document (original and copies) and any item in his possession relating to S's malpractice lawsuit in any way. Under the turnover provision, respondent was required to turnover even his own copies of each document that was introduced into evidence during trial and all other relevant documents in his possession regardless of whether obtained through formal discovery or his own investigation.

A sixth provision purported to toll limitations on any claim that the firm, or any other defendant, might have against respondent for abuse of the civil process "until and unless" respondent breaches a provision of the settlement agreement.

Another provision purported to prohibit respondent from soliciting any of the firm's former, current, or future clients for purposes of pursuing any similar fraud or malpractice claims against them. Moreover, that provision purported to provide that respondent could not use, directly or indirectly, any information he gained during his

representation of S in any other lawsuit he might be involved in then or in the future.

Again, as noted ante, respondent emphatically stated, on the record before the superior court, that he was not a party to the settlement agreement and that he would not agree to become one. In addition, he sternly objected, on the record, to the terms purporting to affect his personal, individual rights and interests. Next, the superior court permitted respondent to question S, on the record, to determine whether she was entering into the settlement agreement freely and with informed consent. S insisted that she freely and knowingly wanted to accept the settlement agreement even though respondent strongly recommended against it. At that point, respondent concluded that he could no longer adequately represent S because he believed that various provisions of the settlement agreement were unethical and possibly illegal. Therefore, he moved to withdraw as counsel, but his motion was denied.

*4 The superior court judge accepted the parties' settlement agreement and decreed that the case was settled. The judge also ordered that all court records in the case (including transcripts of hearings and testimony) be placed under seal. Finally, he decreed that all of the "real-parties-in-interest" and their attorneys were bound by terms of the settlement agreement.

At that point, respondent requested a transcript of the hearing for purposes of appeal, but the judge summarily denied his request. The superior court did, however, indicate that it would consider sending a copy of the transcript to the court of appeal under seal.

Next, respondent renewed his motion to withdraw, and S withdrew her objection to his withdrawal. Accordingly, the superior court granted it. Then, the superior court ordered respondent, under the threat of contempt, to turn over all of his files (including all copies of everything in it)

relating to S's lawsuit to S within 10 days. Respondent curtly stated that he would not turn over his records, and the superior court ordered the bailiff to take him into custody for contempt. After he was taken into custody, the superior court permitted respondent to make a few additional statements for the record. Shortly, thereafter, the superior court revoked its order seizing respondent, and respondent was released from custody.

In accordance with the settlement agreement, S rested. Firm partners made a motion for nonsuit, and the superior court granted it. The superior court called the jury back into the courtroom, ordered them not to disclose anything they heard during the trial with anyone, and then thanked and discharged them. [FN12]

> FN12. On March 28, 1990, the California First Amendment Coalition and the San Francisco Banner Daily Journal filed a motion objecting to the sealing and gag provision in the superior court judge's order enforcing settlement agreement. That motion pointed out a number of infirmities with the sealing and gag provisions and was argued on April 27, 1990. On June 19, 1990, the judge filed a minute order granting the motion in part and releasing the jurors from the gag order and some of the documents from the sealing order.

Once the jury left the courtroom, S moved the court to enforce the settlement agreement by ordering respondent to comply with its terms. The superior court took S's motion under submission and ordered the parties and respondent to file briefs on the issue of whether the court may properly issue a confidentiality order against respondent prohibiting him from discussing the case with anyone in the future even though the case was settled and a judgement would soon be entered in favor of the defendants. To maintain the status quo pending its ruling on S's motion for an order forcing respondent to comply with the settlement agreement, the superior court ordered

the parties and attorneys not to discuss the case with anyone before the hearing resumed the next day, March 8, 1990.

As soon as the March 8 hearing resumed, respondent again requested permission to tape record the hearing or to be permitted to obtain a transcript of it. The superior court refused to allow respondent to record the hearing and stated that "if there is a necessity for transcripts there are means to avail you with that."

Next, respondent presented a number of substantive arguments with supporting authority to the superior court to justify his refusal to comply with the court's order. For example, respondent argued that, even though his client file belonged to S under Supreme Court precedent, he had an absolute right to make and keep a copy of it at his own expense. (See Draftsman's discussion, Rules Prof. Conduct of State Bar, rule 3-700 [silent on the effect of a turnover order].) Moreover, he argued that because S agreed to permit him to conduct his own investigation into her claims and agreed not to ask him to identify to her any person who provided information to him on the condition that he not disclose their identity, he had an independent obligation to those individuals not to turn over any document that would reveal the identity of any such individual. [FN13]

> FN13. The requirement that upon termination of employment members of the State Bar turn over to the client certain papers and property is subject to "protective" orders or non-disclosure agreement. (Rule Prof. Conduct of State Bar, rule 3-700(D)(1).)

*5 Respondent also pointed out that former rule 1-500 of the Rules of Professional Conduct ("former rule 1-500"), [FN14] not only precluded him from entering into an agreement that restricted his right to practice law, [FN15] but also precluded the defense counsel, the firm, and S's

remaining two attorneys from participating in offering or making such an agreement. The firm argued that the settlement agreement did not restrict respondent's right to practice law because it only precluded him from soliciting the partners' clients and because, as they contended, attorneys do not have a right to solicit specific clients. [FN16]

FN14. Former rule 1-500 was effective from May 27, 1989, to September 13, 1992. Former rule 1-500 was carried forward into the current Rules of Professional Conduct with minor modification. (See Rules of Prof. Conduct of State Bar (eff. Sept. 14, 1992), rule 1-500.)

FN15. However, see the later decision in Howard v. Babcock (1993) 6 Cal.4th 409, in which the Court held that rule 1-500 did not forbid an agreement that a retiring law partner not practice in competition with the firm.

FN16. However, the United States Supreme Court put that issue to rest more than two years earlier when it held that an attorney's right to solicit business for pecuniary gain by sending truthful and non-deceptive letters to specific potential clients known to face particular legal problems is protected by the First Amendment, which is made applicable to the states through the Fourteenth Amendment. (Shapero v. Kentucky Bar Ass'n (1988) 486 U.S. 466, 478-480.) In addition, California abolished its blanket proscription of attorney solicitation of specific potential clients regarding their specific individual cases in former rule 2-101(B) of the Rules of Professional Conduct (effective January 1, 1975, to May 26, 1989) by deleting it from the then "new" Rules of Professional Conduct, effective May 27, 1989. (See former Rules Prof. Conduct of State Bar [eff. May 27, 1989, to Sept. 13, 1992], rule 1-400(B); Rules of Prof. Conduct of State Bar, rule 1-400(B).)

Throughout the days of closed court proceedings from March 7, 1990, to March 9, 1990, respondent made it clear that he would willingly turnover to S (or any one she designated) all of her medical and personal history records and all copies of them. However, he steadfastly refused to agree to release to anyone any document that would disclose the identity of anyone who supplied him with information on the condition that their identity be kept confidential. As for all of the remaining documents in S's file, respondent indicated to the superior court that he would willingly turn them over to a court appointed "master" so long as the firm would never have access to them.

Moreover, respondent argued that he needed to keep a copy of almost everything in S's file to establish his quantum merit claim against S for attorney's fees, to use in a lawsuit he intended to bring against a firm partner for abuse of the civil process, [FN17] and to use in his representation of other future clients with fraud claims against the firm for over billing.

> FN17. This partner had filed suit against respondent for fraud that, at the time, was due to be dismissed for failure to bring it to trial within five years of its filing.

Thereafter, the superior court eventually conceded that respondent had, at least, a right to keep copies of or have access to various documents in S's file to establish his claim against a firm partner for abuse of the civil process. In that regard, the superior court indicated that it would permit respondent to obtain anything he needed from S's file for his lawsuit against that partner by an application showing his need. At that time it was after 5 p.m., so the superior court continued the hearing until the next afternoon, Friday, March 9, 1990, at 2:30 p.m. Before the hearing was adjourned for the day, respondent told the superior court that he needed the superior court to reduce his final order to writing so that he would have something

from which to appeal. The superior court told respondent he would get such a written order.

Sometime during the day on March 8, 1990, and unknown to respondent, the superior court signed a minute order sealing the case file. That sealing order, however, was not filed until March 16, 1990, and was not served on respondent until March 23, 1990. [FN18] Respondent received his copy on March 26, 1990.

> FN18. The clerk's certificate of service states that it was served on respondent on March 19, 1990; but the envelope in which respondent received it was dated by the court's postage franking machine as being mailed on March 23, 1990.

When the hearing resumed the next afternoon, Friday, March 9, 1990, a firm partner asserted that the provisions of the settlement agreement (1) regarding confidentiality, (2) requiring respondent to turnover S's complete file and all copies of everything in it, and (3) prohibiting respondent from soliciting any of his clients, were not mere contractual provisions, but conditions precedent. Then, after concluding that respondent never had any intention of complying with these three "conditions precedent," the partner moved for a mistrial. In response, the superior court immediately granted the partners' motion.

*6 Yet, later during the hearing, the superior court found "that there was no mistake in reference to the settlement, neither mutual or unilateral, that there was a settlement and is a settlement." That finding is, of course, a judicial determination vis-a-vis the named parties in the lawsuit. The superior court also rejected as implausible a firm partner's contention that those three provisions were conditions precedent and, therefore, denied the partner's motion for mistrial.

The superior court judge then pronounced from the bench the court's order enforcing the settlement agreement. [FN19] The judge again ordered the court's file and transcripts of the proceedings in the case sealed. In addition, it again ordered the parties not to discuss the settlement agreement or any of the hearings on it with anyone. It ordered respondent to forthwith turn over, to S, all of her medical records and all records containing intimate details of S's personal life. Furthermore, it ordered respondent to collect the originals and all copies of everything else (e.g., documents, etc.) in his possession relating to S's legal malpractice lawsuit. Moreover, it ordered respondent to turn everything over to the court appointed receiver by 9 a.m. on the following Monday, March 12, 1990.

> FN19. Thereafter, on April 4, 1990, the superior court judge signed and filed a written order memorializing this oral order. The confidentiality provision in his written order states: "All parties to this action, including all lawyers of the parties and former lawyers of the parties, are prohibited from discussing this case, or this settlement, with the press or with any other person pending further order of the court."

The superior court appointed the receiver to take possession of all of respondent's files relating to S and to keep them "under seal." Even though the receiver was to keep the records confidential, he was directed to make them available to law enforcement officials, the State Bar, and the Commission on Judicial Performance. No one else was to have access to them except by court order issued pursuant to an application showing good cause and a legitimate need for access.

In addition, the court would review the necessity of keeping the records confidential every three months and then, when it determined that there was no longer a need to keep them confidential, the receiver would destroy them. Finally, the parties and attorneys were not to

contact or otherwise communicate with the receiver in an attempt to obtain access to the files. The superior court judge instructed one of S's remaining attorneys to prepare a written order for the judge to sign by Monday, March 12, 1990.

Because it was late in the afternoon on a Friday, respondent asked the superior court to stay his order enforcing the settlement agreement so that respondent would have to time to seek a stay and review from the court of appeal. The superior court denied respondent's request and directed respondent to comply with the order even though it was not then reduced to writing.

Sometime over the following weekend, S telephoned respondent and left a message on his answering machine instructing him to comply with the superior court's order enforcing the settlement agreement and to turn over her file to the court appointed referee. However, when the referee appeared at respondent's office at the appointed time on Monday, March 12, 1990, respondent turned over only S's medical and personal records. As respondent maintained he would throughout the three-day settlement hearing, he refused to turn over any other of his records to the referee.

*7 On March 16, 1990, respondent sent, by messenger, the following pleadings to the superior court for filing: (1) a notice of appeal as to the order enforcing settlement agreement; [FN20] and (2) a notice to prepare transcript for his use in preparing a petition to the court of appeal for a writ of prohibition. Respondent properly instructed the court clerk that both of those pleadings were to be filed under seal in accordance with the superior court's sealing order. However, the same deputy clerk who filed the superior court's March 8, 1990, sealing order on March 16, 1990, rejected respondent's pleadings for filing and mailed them back to him with the following "explanation": "We cannot file this under seal without an order of court." Respondent did not know that these pleadings had not

been filed until he received them back from the clerk on March 22, 1990. [FN21]

> FN20. Contrary to respondent's assertions, the notice of appeal he presented for filing appears to pertain only to a December 22, 1987, oral order, which was reduced to writing and signed by the judge on April 8, 1988, and filed on April 15, 1988.
>
> FN21. Respondent was finally able to file them on May 25, 1990, by deleting any reference to the sealing order. Respondent did not pursue this appeal because he never got a copy of the transcripts from the clerk.

According to respondent, he believed that all of the mandatory injunctive provisions (i.e., provisions compelling a party to perform an act) in the superior court's oral order of March 9, 1990, were stayed by his submission of the notice of appeal for filing on March 16, 1990. In other words, respondent claims that, from March 16, 1990, through March 22, 1990, he believed that he was required to obey only the prohibitory injunctive provisions (i.e., provisions seeking to maintain the status quo by prohibiting a party from doing something) in the order.

On March 16, 1990, respondent hand-delivered a nine-page, single-spaced letter to the judge of an unrelated civil case in which a firm partner represented a number of plaintiffs. That unrelated case was a judicial council coordination proceeding in which the many lawsuits for personal injuries arising from an airplane crash were "consolidated." Accompanying respondent's letter were: (1) a separate, sealed envelope of exhibits to the letter and (2) an unfiled and unserved motion to intervene, as a "potential" lienholder, in the airplane crash case. Respondent sent a copy of this letter to the superior court in S's malpractice lawsuit.

According to respondent, he wrote his March 16, 1990, letter to the judge in the airplane crash case as a friend-of-the-court in hopes of preventing a firm partner from overbilling the partner's clients for costs and expenses in the airplane crash case as he had allegedly done to S in her personal injury case. During the time he was preparing S's case for trial, respondent learned that the airplane crash case had settled and that the partner had submitted, to the court in that case, a request for reimbursement of approximately $250,000 for investigation expenses he paid for his clients.

In his March 16, 1990, letter, respondent described the method the firm partner allegedly used to overbill S for advanced costs and expenses in her personal injury lawsuit. In addition, he recited that S settled her malpractice lawsuit for $750,000 and that the settlement agreement contained a strict confidentially provision. However, the majority of the letter is a recitation of the injustices allegedly done by the superior court in S's malpractice lawsuit, including his injunctive order enforcing the settlement agreement.

*8 In a separate, sealed envelope that accompanied his March 16, 1990, letter were copies of many of the documents respondent referred to in the letter. Respondent also pointed out that some of the "originals" of the copied documents in the envelope were in the sealed record in S's malpractice lawsuit.

On March 19, 1990, the judge in the airplane crash case signed an order reciting that he received these items from respondent, that they were returned to respondent unread, and that he would consider them only if they were properly filed and served. Even though the judge did not mention sealing court records in his March 19, 1990, order and even though respondent did not attempt to file anything in that court under seal, respondent understood the judge's order to mean that he was under a blanket prohibition against filing documents under seal in the

judge's court.

Therefore, on March 23, 1990, respondent sent his motion to intervene to the court clerk for filing, but did not serve it on the parties. Asent the judge in the airplane crash case a cover letter enclosing (1) a courtesy copy of his motion and (2) his March 16, 1990, letter and its envelope of exhibits.

Respondent served copies of the his March 23, 1990, cover letter without any of its enclosures on the parties in the airplane crash case. He also served copies of his cover letter and all of its enclosures to the superior court in S's malpractice lawsuit and to a firm partner.

In his cover letter, respondent stated that he had not served and would not serve copies of his motion on the parties until March 31, 1990, so that the partner would have time to move to have it sealed if the partner wanted to. Moreover, even though respondent presented the partner his motion to intervene for filing on March 23, 1990, it was not filed until April 5, 1990.

On March 23, 1990, respondent signed a "petition for writ of mandate, prohibition, certiorari, etc." ("petition for writ of mandate") for filing in the court of appeal seeking review of the superior court's order enforcing the settlement agreement. He served copies of that petition for writ of mandate on the parties on March 30, 1990. The record does not reflect when it was actually filed with the court. Nevertheless, it was summarily denied, on April 11, 1990, as premature until and unless respondent was held in contempt.

A firm partner filed an objection to respondent's motion to intervene in the airplane crash case. The partner's objection included a request for sanctions against respondent for filing a frivolous motion. On July 3, 1990, the judge in the airplane crash case denied both

respondent's motion to intervene and the partner's request for sanctions against him.

In May 1990, two firm partners and S filed a request for an order requiring respondent to show cause why he should not be held in contempt for not obeying the superior court's order enforcing the settlement agreement in S's malpractice lawsuit. On May 23, 1990, the San Francisco Superior Court issued such an order to show cause against respondent.

*9 Even though the order to show cause had been issued against respondent, he was still unable to obtain a copy of the transcript of the three-day settlement hearing, which was first sealed under the March 8, 1990, sealing order. Finally, after respondent complained of this to the judge who issued the order to show cause against him, that judge issued an order directing the clerk promptly to provide respondent with a copy of the transcript. That order also provided that, if respondent was not provided with a copy of the transcript, the order to show cause would be dismissed.

The clerk thereafter provided respondent with a copy of the transcript. On August 10, 1990, a hearing was held on the order to show cause. Respondent attended that hearing, but waived his right to be present when it resumed on August 24, 1994. Nevertheless, respondent sent his attorney to appear for him when the hearing resumed on August 24, 1990. The court closed the hearing from the public, excluded respondent's attorney from the hearing and then convicted respondent of one count of civil and criminal contempt and two additional counts of criminal contempt for violating the Superior Court's order enforcing the settlement agreement.

In adjudicating respondent guilty of contempt, the court expressly refused to even consider respondent's contentions that the order was void in excess of the court's jurisdiction. The court then found respondent guilty of the

following three counts of contempt: (1) civil and criminal contempt for not turning over S's files and all copies of everything in them to the court-appointed receiver on March 12, 1990; (2) criminal contempt for filing his March 23, 1990, petition for writ of mandate in the Court of Appeal without its being filed under seal; [FN22] and (3) criminal contempt for filing his motion to intervene in the airplane crash lawsuit on April 5, 1990, without its being filed under seal. The judge pro tem also fined respondent $1,000 per contempt for a total of $3,000. In addition, respondent was ordered to pay sanctions of approximately $2,300.

> FN22. As noted, ante, the record does not reflect when the petition for writ of mandate was actually filed.

On October 5, 1990, respondent filed a "petition for writ of certiorari of [sic] prohibition" in the Court of Appeal again seeking review of the order enforcing the settlement agreement. Respondent also first sought review of the contempt judgment in that petition. The Court of Appeal denied that petition. On February 4, 1991, respondent filed a petition for review of the Court of Appeal's denial of that petition. The Supreme Court denied respondent's petition for review on March 28, 1991. The United States Supreme Court denied certiorari in October 1991.

Even though respondent's October 5, 1990, "petition for writ of certiorari of [sic] prohibition" was still pending at the time, on October 25, 1990, respondent filed a notice of appeal from the contempt judgment and sanction order. Almost a year later, the Court of Appeal issued an order, on October 22, 1991, conditionally granting S's motion to dismiss his October 25, 1990, appeal. In that order, the Court of Appeal ordered respondent to comply with the turn-over provision of the superior court judge's April 4, 1990, order enforcing settlement agreement by giving S's file and all copies of everything in it to the referee no later than November 5, 1991. The order further provided that if respondent did not so comply, his appeal would be

dismissed.

*10 On October 28, 1991, respondent filed a motion for clarification and reconsideration of the Court of Appeal's October 22, 1991, order. In his motion for clarification, respondent pointed out that if he complied with the turnover order, he would not have the documents needed to prepare his appeal. The Court of Appeal denied respondent's motion for clarification. Respondent did not comply with the turnover provision, and the court of appeal dismissed his appeal on November 19, 1991, in accordance with its October 22, 1991, order. Thereafter, respondent sought reconsideration of the dismissal order from the Court of Appeal, which was denied. He also petitioned the California Supreme Court and United States Supreme Court for review of the dismissal order, but both courts denied his petitions.

II. DISCUSSION

A. Rulings on Motions.

At the outset, for a clear record, we recite the rulings we made from the bench at oral argument on motions brought prior to that time. We deny: respondent's motions for judicial notice and to augment the record filed June 16, 1995, the State Bar's request for relief from briefing requirements filed August 14, 1995, respondent's requests for sanctions, etc., filed August 14, 1995, and respondent's request for rulings filed March 8, 1996.

Shortly prior to the filing of this opinion, respondent filed a motion to advance the disposition of this case and to take judicial notice of certain authorities. The State Bar opposed the motion insofar as it concerned judicial notice. We decline to consider the additional authorities as there was ample opportunity given respondent to file briefs and cite authorities to us. Our filing of this opinion renders the remainder of respondent's motion moot.

Under the authority of rule 23, Rules of Procedure of the State Bar, we continue in effect the supplemental sealing order filed by the hearing judge on July 27, 1994.

B. Culpability.

The portion of section 6103 at issue here reads as follows: "A wilful disobedience or violation of an order of the court requiring [the attorney] to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, ... constitute[s] cause for disbarment or suspension." For respondent to be disciplined under this law, we hold that the State Bar must prove two elements by clear and convincing evidence: 1) that respondent wilfully disobeyed an order of the court; and 2) that the court order required respondent to do or forbear an act in connection with or in the course of respondent's profession which he ought in good faith to have done or not done.

As to the first issue, respondent admitted deliberately violating the confidentiality order. On this record, there can be no doubt that his violation of the court order was wilful, even applying the somewhatevel of wilfulness required for violations of the State Bar Act, as opposed to violations of the Rules of Professional Conduct. (Compare, e.g., Call v. State Bar (1955) 45 Cal.2d 104, 110-111, with Zitny v. State Bar (1966) 64 Cal.2d 787, 791-792.)

*11 As to the second issue, again respondent admits that the superior court order directed him to do or forbear acts in connection with his profession. (Compare Maltaman v. State Bar (1987) 43 Cal.3d 924, 950 [an attorney's deliberate violation of a court order directed at him in his capacity as a removed representative of a decedent's estate cannot be a violation of section 6103 because the order was not issued in connection with or in the course of the attorney's profession as a lawyer].) Respondent contends, however, that he was not required in good faith to obey the court order as in his view it was void. According to respondent,

the order allegedly enforces an illegal agreement to suppress evidence, violates his First Amendment rights of free speech, and improperly restricts his right to practice law.

The hearing judge rejected respondent's contention that the superior court order was void. Although the hearing judge found that respondent honestly believed that the superior court order was void, the hearing judge, citing and quoting from our opinion in In the Matter of Klein (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9, concluded that "'Respondent's belief as to the validity of the order is irrelevant to the section 6103 charge.'" Accordingly, relying on our opinion in In the Matter of Boyne (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389. 403-404, the hearing judge held that, regardless of whether the superior court's order was void, respondent was required to obey it under section 6103 unless and until it was reversed on appeal. We agree with the hearing judge's overall conclusion that respondent is culpable of a violation of section 6103 but our agreement is based on somewhat different reasoning than that of the hearing judge.

The hearing judge's holding that respondent is bound to comply with the superior court order unless and until he successfully challenged its validity on appeal is apparently based on the same beliefs and policy considerations underlying what is referred to as the "collateral bar rule." (See People v. Gonzalez (1996) 12 Cal.4th 804, 818.) The collateral bar rule ordinarily prohibits a contemnor from raising the invalidity of a court order as a defense to a criminal contempt charge so as to permit even a void court order to be enforced through criminal contempt [FN23] unless and until it is vacated on appeal. (United States v. United Mine Workers (1947) 330 U.S. 258, 293-294; see also Zal v. Steppe (9th Cir. 1992) 968 F.2d 924, 927.) Its "genesis ... stems from the widely held belief that a smoothly functioning judicial process may be jeopardized if parties are able to determine for themselves when and

how to obey court orders." (In re Establishment Inspection of Hern Iron Works, supra, 881 F.2d at p. 726.)

> FN23. Of course, the invalidity of the underlying order is always a defense to a civil contempt charge. (In re Establishment Inspection of Hern Iron Works (9th Cir. 1989) 881 F.2d 722, 726, fn. 11.)

Yet, the collateral bar rule is not the rule in California. (People v. Gonzalez, supra, 12 Cal.4th 804 at p. 818-819.) As the Supreme Court stated in Gonzalez, "The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment." (Id. at p. 817.) Moreover, in California, "'a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial determination as to its jurisdictional validity. [Citation.] On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is therefore, finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong. [Citations.]'" (Id. at pp. 818-819, emphasis and citations omitted in original, quoting from In re Berry (1968) 68 Cal.2d 137, 148-149.)

*12 In the case before us, respondent sought appellate review as soon as the superior court issued its confidentiality order. When he was unsuccessful, he exercised his right under California law to choose to violate the order. When faced with a contempt hearing,

respondent waived personal appearance and the court found respondent guilty of civil and criminal contempt, declining to consider his constitutional claims. When faced with contempt judgments, respondent appealed unsuccessfully. The contempt judgments became final.

This record contrasts with Gonzalez where the lower courts concluded that they had no jurisdiction to entertain the contemnor's challenges during the contempt proceeding or subsequent appeals. Accordingly, we do not read Gonzalez to permit us in this record to entertain a collateral attack before us of the underlying superior court order leading to the contempt judgment. Respondent had his opportunities to litigate in the courts of record his claims that the order he violated was void. We are given no valid reason to go behind the now-final order.

As to the validity of the court's confidentiality order, we are therefore faced with a case in which we properly defer to the collective judgment of the courts of record which heard the contempt proceeding and which found respondent guilty and to the courts which considered respondent's subsequent appeal and requests for reconsideration and certiorari.

Although respondent withdrew from employment as soon as S insisted on accepting the settlement agreement with its confidentiality order, respondent still had a fiduciary duty to his former client. (See Tri-Growth Centre City, Ltd. v. Sildorf, Burdman, Dunigan & Eisenberg (1989) 216 Cal.App.3d 1139, 1151.) It is without dispute that S, not respondent, had the right to decide to settle her legal malpractice case on the chosen terms. (See generally, Linsk v. Linsk (1969) 70 Cal.2d 272, 276-278; 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 272, pp. 336-337.) As S's former lawyer, respondent was under a good faith duty to act consistently with his client's settlement agreement at least to avoid revealing to others the amount of the settlement as well as the evidence obtained in the case, except as allowed by the civil settlement judge.

Under the circumstances, respondent was culpable as found by the hearing judge of violating section 6103.

C. Degree of discipline

The well-settled rule is that the degree of professional discipline is not derived from a fixed formula but from a balanced consideration of all factors. (E.g., Sugarman v. State Bar (1990) 51 Cal.3d 609, 618.) Although a wilful violation of section 6103 is stated by statute to be a ground of disbarment or suspension (also see std. 2.6, Rules Proc. State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct), discipline within that range is not mandated. (Cf. In re Cooper (1971) 5 Cal.3d 256 [imposing a public reproval in a conviction in which the facts and circumstances involved moral turpitude].)

*13 We have examined the Supreme Court's and our past decisions in which attorneys have been disciplined for wilful disobedience of a court order. The discipline in those cases appears to have turned on many factors not comparable to the case before us, including the involvement of other violations of the standards of attorney conduct.

The hearing judge found no factors in aggravation. We agree. We also agree with the several factors in mitigation which the hearing judge found. These include respondent's 18-year practice without prior discipline (see Hawes v. State Bar (1990) 51 Cal.3d 587, 596); that respondent was under great pressure in that his client and co-counsel disagreed with his principled approach to the basic settlement and the confidential terms which were a part of it; and that respondent held sincere beliefs that he was acting in support of sound public policy by revealing the confidential information to the judge in the airplane crash case.

The State Bar does not seek to increase the discipline recommended by the hearing judge. Although our duty to independently recommend appropriate discipline cannot cause us to give excess weight to the State Bar's recommendation (In re Morse (1995) 11 Cal.4th 184, 207), we do give it some consideration. Also worthy of consideration is the unique nature of the violation here and that respondent sought first to test by extraordinary writ the court order he violated.

Balancing all relevant factors, and especially taking into account the unique nature of this matter, we deem a private reproval to be the appropriate discipline.

III. DISPOSITION

Respondent X is hereby privately reproved. Considering the very specific nature of the violation and the other unique facts of this proceeding, we do not adopt the hearing judge's recommendation that respondent take and pass a professional responsibility examination.

NORIAN, J., concurs.

OBRIEN, Presiding Judge, concurring:

I concur in the result, but for reasons different from those enunciated by the majority.

As the majority points out, People v. Gonzalez (1996) 12 Cal.4th 804, 817, states "The rule is well settled in California that a void order can not be the basis for a valid contempt judgment." Gonzales further directs that in a criminal prosecution, even an inferior court has the duty to determine the validity of a superior court order, when that order is an element in the crime for which the defendant has been required to answer. (Id. at pp. 820-822.) The defendant's failure to challenge the order when issued does not preclude him from asserting the invalidity of such an order. (Id. at 818.)

As the majority notes, respondent sought appellate review of both the original order that he is charged with violating, and, after being found in contempt, he unsuccessfully sought review of his contempt judgement.

I note that at no point in either the hearing on the contempt charges or the review proceedings did any court rule on the substance of respondent's claims that the superior court order that respondent is charged with violating was constitutionally void. The record demonstrates that the superior court judge hearing the contempt proceedings specifically refused to consider respondent's constitutional claims, and that each of the matters on review were dismissed for various reasons. The fact that respondent sought writs in both the California Supreme Court and the Supreme Court of the United States (all of which were denied) does not change the fact that there is no showing that there was ever a consideration of respondent's substantive issues, nor do they appear to have been waived.

*14 I see little difference between a situation in which one fails to challenge a superior court order, as in Gonzales, and where, as in this case, one makes the challenge in such a manner as to fail to have such an order considered on the merits.

The sole procedural distinction between the matter before us and Gonzales is that in the present matter the superior court found that respondent was guilty of both civil and criminal contempt, while in Gonzales the initial challenge to the constitutionality of the order was made at the time of the criminal matter, which was on direct appeal. We are confronted with whether this court, under these circumstances, is collaterally estopped from considering the validity of the underlying superior court order, since respondent has been found guilty of violating that order.

"If the parties expressly exclude a particular issue from onsideration, or the court expressly refrains from determining it, no collateral estoppel results." (7 Witkin, Cal. Procedure (3rd ed.) Judgment, § 266, p. 707, and cases cited.) At the time of the hearing on respondent's quasi-criminal and civil contempt matters, the superior court specifically indicated that it would not consider respondent's constitutional challenges to the underlying court order that he was charged with violating.

While respondent may or may not be able to challenge the validity of the superior court order in this disciplinary proceeding, he must, nonetheless comply with the provisions of Business and Professions Code section 6103. [FN1] That section provides in effect that willful violation of an order of court requiring an attorney to do or forbear an act connected with the practice of law, "which he ought in good faith to do or forbear," is a basis for discipline.

> FN1. All future references to "section" are to sections of the Business and Professions Code.

Although orders imposing confidentiality on settlement agreements are not uncommon, most of those orders result from the agreement of all of the parties, including the attorneys representing those parties in the settlement agreement. Our research has revealed no cases in California dealing with a situation in which the attorney has refused to join in the settlement agreement. The question becomes, under the described circumstances, must an attorney "in good faith," under section 6103, comply with such an order.

It is my view that where the failure to comply with such an order does or reasonably may adversely impact the rights of the client seeking the settlement, and compliance with the order will not adversely affect any person to whom the attorney has a fiduciary duty, compliance with such an order is mandated under section 6103. (Cf.

Hughes v. Superior Court (1980) 106 Cal.App.3d 1.) This does not mean that the attorney does not have the right to otherwise challenge the order through the conventional channels of appeal or writ.

I agree with the majority that the delivery of the information concerning the settlement to a judge in another matter in which respondent had no legal standing or interest constituted a violation of section 6103, and subjects respondent to the discipline herein imposed. Respondent ought, in good faith, to have complied with this provision of the superior court order, whether that order was valid or not.

*15 In addition, respondent violated several other portions of the superior court order. Those portions of the order required respondent to deliver all of his work product to the court, and required him to, in effect, divulge to court under seal the identity of a secret informant whom he had assured of confidentiality. The order also purported to prohibit respondent from soliciting any of the defendant law firm's clients for the purpose of pursuing any similar fraud or malpractice claims against the firm.

Restraint of publication of anything that occurred ceeding plainly violates First Amendment principles. (Nebraska Press Ass'n v. Stuart (1976) 427 U.S. 539, 568.)

An order based on good cause restricting the dissemination of information obtained only through discovery, and not other sources, does not violate the restricted party's First Amendment rights. (Seattle Times Co. v Rhinemart (1984) 467 U.S. 20, 37.) The concomitant rule is that an order restricting the dissemination of information not obtained through discovery is violative of the restricted party's First Amendment rights. An order restricting dissemination of information lawfully obtained in the course of court proceedings independent of discovery also violates the "free speech" provision of the

California Constitution. (In re Marriage of Candiotti (1995) 34 Cal.App.4th 718, 724.)

To the extent that the superior court order purported to prohibit respondent from distributing information or records that he lawfully obtained outside of the discovery process I would hold it not a matter for disciplinary purposes in seeking culpability under section 6103, under the circumstances of this case.

I also note that the settlement agreement proposed by the firm and approved by the trial court, which respondent refused to sign, purported to prohibit him from using any information he gained while representing S in any other law suit. That agreement also purported to prohibit respondent from soliciting any of the firm's former, current or future clients for purpose of pursuing similar fraud claims against them. This raises a question of whether the agreement proposed by the firm and ordered by the trial court was violative of former rule 1-500(A) of the Rules of Professional Conduct. (As noted in footnote 14 of the majority opinion, former rule 1-500 was carried forward into the current rule with minor modifications, not applicable here.) The discussion under the former rule (as well as the current rule) states, "Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited." I would hold that the above portion of the order may not give rise to disciplinary sanctions under section 6103 under the circumstances of this case. (Cf. Hughes v. Superior Court, supra, 106 Cal.App.3d 1.)

I concur with the discipline and rationale for that discipline as set forth in the majority opinion.

APPENDIX E

(Extracted from Transcript of settlement hearing, March 8, 1990, San Francisco Superior Court)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT 7

BEFORE HONORABLE ALFRED G. CHIANTELLI, Judge

MARIA SEWARD aka MARIA SEWARD SARGENT, Plaintiff,

vs.

GERALD C. STERNS, et al., Defendant.

NO. 826-241

SEALED

REPORTER'S TRANSCRIPT

Proceeding of March 8, 1990

... By Mr. Mehlman: "And he may eventually wind up--eventually wind up having his own ticket pulled as a result of this activity...

lines 26-28.

STATE OF CALIFORNIA
SS.
CITY & COUNTY OF SAN FRANCISCO
REPORTER'S CERTIFICATE

I, S.G. MCGREGOR, an Official Court Reporter of the Superior Court of the City and County of San Francisco,

State of California, do hereby certify that the foregoing is a full, true and correct statement of the testimony and proceedings had in the above-entitled matter, and that the same is a full, true and correct transcription of the shorthand notes as taken by me in said matter.
Dated at San Francisco, California, this 18th day of March, 1990.

APPENDIX F

(Extracted from DECISION of Hearing Department, State Bar Court)

PUBLIC MATTER
Filed Oct 14 1994
State Bar Court Clerk's Office
San Francisco

STATE BAR COURT
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of NICHOLAS R. DAMER, No. 52309

A Member of the State Bar.

Case No. 90-O-15007-AKG

DECISION

p. 36 ... Respondent's [Petitioner herein] former co-counsel, had determined not to name Respondent in the settlement check and he [Petitioner], not unreasonably, had asserted an equitable lien interest in the settlement proceeds....

p.37 ... [Respondent] violated a court order out of an incorrect but well-intentioned belief that the order was improperly made and not in the best interests of his client and other persons who may have been similarly situated. ... Respondent's refusal to obey the court's order, although inappropriate, was a principled refusal and he acted primarily with the interests of others in mind.